



March 26, 2002

Ms. Genevieve G. Stubbs  
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The Texas A&M University System  
301 Tarrow, 6th Floor  
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OR2002-1496

Dear Ms. Stubbs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160002.

Texas A&M University and the Texas Transportation Institute (the "university") received a request for the following information:

1. All and complete records of every development, compliant or other ET-2000 terminal end impact test at an angle 0° to 30°.
2. All and complete records of every development, compliant or other terminal end impact test for the ET-2000 in which the W beam buckled.
3. All and complete factual information with respect to any ET-2000 terminal end impact accident and/or test resulting in a fatality or were [sic] any part of the guardrail speared the vehicle including all in-service data.
4. All and complete records indicating any analysis of the conditions under which ET-2000 terminal end impact will result in W beam buckling, and/or vehicle spearing, including any analysis performed in the development of the ET-2000 terminal end.
5. Original prints of sequential photographs for Test 220510-4 (Research Study No. 2205102 220537) (overhead and frontal views).

6. All records pertaining to the in-service performance of the ET-2000 terminal end, including but not limited to, evaluation forms, photographs, police reports and reports, raw data, evaluations performed/collected by or on behalf of any State Department of Transportation.
7. Any and all agreements between the Texas Transportation Institute/Texas A&M University and Syro/Trinity pertaining to the sale or marketing of the ET-2000, including but not limited to the memorandum agreement dated October 13, 1993, including all appendix [sic] and all amendments thereto.
8. The license agreement of September 10, 1998, including all appendix [sic] and amendments thereto.

You indicate that while the university has not conducted any in service studies of the ET-2000, the State of Ohio has conducted such a study and the State of Ohio should be asked to provide a copy of the report. The Public Information Act generally does not require a governmental body to disclose information that it does not possess. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Gov't Code § 552.002. However, to the extent the university does possess the in service study report, it is considered public information and it must be released. See Gov't Code §§ 552.021, .221, .301, .302. You claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.110 of the Government Code. We have also received arguments from a third party on behalf of the Texas Transportation Institute. We have considered all of the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

We begin by noting that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body . . . .

Gov't Code § 552.022(a)(1), (3). Thus, the contracts in Attachment No. 2 and Research Report 404-1F are subject to public disclosure unless they are confidential under other law or, in the case of the report, if it is excepted from disclosure under section 552.108 of the Government Code. You do not contend that the research report is excepted under section 552.108. Furthermore, section 552.103 of the Government Code is a discretionary exception and is not other law for the purpose of section 552.022. Open Records Decision No. 663 (1999) (governmental body may waive section 552.103). Thus, the university may not withhold the submitted contracts or the submitted research report under section 552.103. Nevertheless, we will address whether the contracts and the research report are excepted from disclosure under sections 552.101 and 552.110 of the Government Code.

First, we address your argument under section 552.103 of the Government Code with respect to Attachment No. 1. Section 552.103 excepts from public disclosure information that relates to litigation to which the governmental body is a party. Information that is within the public domain, whether or not it relates to the pending litigation, cannot be withheld under section 552.103. You indicate that Attachment No. 1 was produced by the National Research Council and is part of a "public document." Consequently, Attachment No. 1 is not excepted from disclosure under section 552.103.

Next, we address your argument under section 552.101 of the Government Code with respect to all of the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 51.914 provides in pertinent part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee . . . .

Educ. Code § 51.914(1) (emphasis added). The purpose of section 51.914(1) is to protect the “actual or potential value” of technological and scientific information developed in whole or in part at a state institution of higher education. *See* Open Records Decision No. 497 at 6 (1988) (interpreting former Education Code section 51.911). You indicate that the requested information relates to a highway safety product—ET-2000—that the university developed. Furthermore, you indicate that the university has obtained a patent on this technology and the technology has been licensed to Trinity/Syro. Based on your arguments and our review of the submitted information, we agree that the Research Report 404-1F is confidential under section 51.914 of the Education Code. *See* Educ. Code § 51.914(1); Open Records Decision Nos. 651 (1997), 557 (1990), 497 (1988). However, we find that the licensing contracts between the University and Trinity/Syro do not directly reveal details about the technology and therefore are not confidential under section 51.914. *See* ORD 497 at 6. Likewise, we find that you have not adequately demonstrated that Attachment No. 1 directly reveals details about the technology that could be sold, traded, or licensed. *See id.* Thus, while the university must withhold the research report under section 51.914 of the Education Code in conjunction with section 552.101 of the Government Code, the remainder of the submitted information may not be withheld under section 51.914.

With respect to the information that is not confidential under section 51.914, we address the issue of whether the information is excepted from disclosure under section 552.110 of the Government Code. Although you raise section 552.110 as a possible exception to the disclosure of some of the information, you rely on counsel for Trinity/Syro to make specific arguments applying this exception to the requested information. We have not received any arguments from Trinity/Syro or anyone indicating that they represent Trinity/Syro. However, as we stated earlier, we received arguments from a third party making arguments on behalf of the Texas Transportation Institute. The third party contends that the requested information consists of trade secrets for the purpose of section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device,

or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>2</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

With respect to the commercial or financial information prong of section 552.110, we note that the exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

While both the university and the third party raise section 552.110 as a possible exception to the disclosure of the requested information, neither makes a *prima facie* showing that any of the information at issue constitutes trade secrets nor a specific factual showing that the release of the information at issue would cause substantial competitive injury. Therefore, we find that the remaining information may not be withheld under section 552.110 of the Government Code.

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

In summary, the university must withhold Research Report 404-1F under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The university must release the remainder of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

NEB/sdk

Ref: ID# 160002

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